

IN THE SUPREME COURT OF OHIO

NEW YORK FROZEN FOODS, INC. AND :
AFFILIATES, : CASE NO. 15-0575
:
Appellants, : On Appeal from the Ohio Board of Tax
:
v. : Appeals
:
BEDFORD HEIGHTS INCOME TAX :
BOARD OF REVIEW, *et al.*, :
:
Appellees. :
:
:
:
:

**APPELLEES' MOTION TO DISMISS APPEAL FOR LACK OF
APPELLATE JURISDICTION
AND MEMORANDUM IN SUPPORT**

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APPELLEES' MOTION TO DISMISS

Under S.Ct.Prac.R. 4.01, S.Ct.Prac.R. 10.01(A), and R.C. 5717.04, Appellees Bedford Heights Income Tax Board of Review and City of Bedford Heights Income Tax Administrator (collectively, "Bedford Heights") respectfully move this Court to dismiss this appeal for lack of appellate jurisdiction. As detailed in the attached Memorandum in Support, Appellants, New York Frozen Foods, Inc. and Affiliates (collectively, "NYFF") failed to perfect their appeal from the Board of Tax Appeals within 30 days of the entry and journalization of the BTA's decision below, as is required by R.C. 5717.04. It is black letter law that when "a notice of appeal is not filed within the time prescribed by law, the reviewing court is without jurisdiction to consider" the appeal. *State ex rel. Pendell v. Adams Cnty. Bd. Of Elections*, 40 Ohio St. 3d 58, 60, 531 N.E.2d 713 (1988). NYFF's failure to timely file and perfect its appeal in accordance with R.C. 5717.04 dooms this appeal. Accordingly, Bedford Heights respectfully requests that this appeal be dismissed for lack of appellate jurisdiction.

DATED: April 16, 2015

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF APPELLEES' MOTION TO DISMISS

I. STATEMENT OF RELEVANT FACTS AND THE CASE

In the administrative proceedings below, NYFF sought a refund of net profits taxes that it paid to Bedford Heights for tax years 2005, 2006, and 2007. NYFF argued below that it was entitled to a refund because it changed its method of filing its municipal income tax returns from single filer to a consolidated filer basis. The administrative tribunals below, however, correctly concluded that the applicable regulations prohibited NYFF from changing its method of filing and seeking a refund on that basis.

In July 2011, the Bedford Heights City Tax Administrator properly denied NYFF's refund claim. NYFF appealed that decision to the Bedford Heights Income Tax Board of Review, which affirmed the Tax Administrator's decision in November 2011.

NYFF next appealed to the BTA. Key to this Motion, on March 9, 2015, the BTA entered a decision on its journal denying NYFF's appeal. The BTA concluded that Bedford Heights's incorporation into its own ordinances of RITA Rule and Regulation Section 5.06(A), which barred a taxpayer from "chang[ing]" its "method of filing after the due date for filing the original return," barred NYFF's refund claim:

Based upon the foregoing case law and the language of the BHAC Section 173.56, we find that the City, in its most recent incorporation of RITA Rules and Regulations in December 2004, clearly incorporated the July 2009 change to RITA Rule 5:06(A) which prohibits changing the method of filing in an amended return. Accordingly, we find that the rule did bar appellants' filings.

See 3/9/15 BTA Decision and Order at 4. But before ultimately siding with Bedford Heights, the BTA agreed with NYFF that their change from single to consolidated filing did not constitute a "change" in "the method of accounting or apportionment of net profits," which was an

independent basis on which Bedford Heights sought to bar NYFF's refund claims. The BTA's March 9 decision, however, contained a "typographical error" in which the BTA stated, "We disagree" instead of "We agree" with NYFF's argument on this point.

On March 18, 2015, NYFF filed a motion for reconsideration with the BTA. NYFF asked the BTA to reconsider its decision on the merits, but also pointed out that "typographical error" and asked the BTA to correct it. On March 20, 2015 (before Bedford Heights had an opportunity to oppose the motion for reconsideration), the BTA denied NYFF's Motion for Reconsideration:

This matter is again considered by the Board of Tax Appeals upon appellants' motion for reconsideration. Appellants argue that this board failed to adequately respond to its arguments regarding the city's unconstitutional delegation of authority per its ordinances. *Upon review of the motion, we find the request for reconsideration fails to meet the standard set forth in Matthews v. Matthews (1981), 5 Ohio App.3d 140, and is therefore denied.*

See 3/20/15 BTA Decision and Order at 1 (all emphasis in this Memorandum is added). The BTA then purported to "vacate" the March 9 decision to correct the "typographical error" highlighted by NYFF.

The March 20, 2015 Decision and Order denying NYFF's motion for reconsideration is nothing more than a reiteration of the March 9, 2015 Decision and Order with the one typo corrected: changing the phrase "We disagree" on line 2 of the last paragraph of page 2 to "We agree." Besides that change, the decisions are identical. *See Ex. A.* attached hereto.¹ Importantly, none of the issues NYFF now seeks to appeal were affected at all.

NYFF filed its notice of appeal on April 10, 2015—32 days after the BTA's March 9, 2015 decision was entered on the journal and two days after its deadline for appealing under R.C.

¹ Exhibit A is a redline of the two decisions showing that besides the mere word change, no other changes were made to the March 9 decision.

5717.04. Even though the March 20, 2015 Decision and Order did not affect any of the issues it now seeks to appeal (many of which are constitutional issues), NYFF purports to be appealing the March 20, 2015 Decision and Order. But as detailed here, NYFF's attempt to appeal that Decision is legally inappropriate, and its appeal is otherwise untimely and should be dismissed.

II. LAW AND ARGUMENT

A. NYFF's appeal must be dismissed for lack of jurisdiction because NYFF failed to appeal within the time prescribed by R.C. 5717.04.

R.C. 5717.04 prescribes the procedure by which a party may appeal from an adverse BTA decision. It provides, in relevant part, that a party must appeal within 30 days after the date of the BTA's entry of its decision on its journal:

Such appeals shall be taken within thirty days after the date of the entry of the decision of the board on the journal of its proceedings, as provided by such section, by the filing by appellant of a notice of appeal with the court to which the appeal is taken and the board.

*See R.C. 5717.04; see also S.Ct.Prac.R. 10.01(A) (restating 30-day appeal period and otherwise incorporating R.C. 5717.04's requirements for perfecting an appeal to this Court from the BTA). Generally, when "a notice of appeal is not filed within the time prescribed by law, the reviewing court is without jurisdiction to consider" the appeal. State ex rel. Pendell v. Adams Cnty. Bd. Of Elections, 40 Ohio St. 3d 58, 60, 531 N.E.2d 713 (1988). This general principle applies with equal force in appeals from the BTA and other administrative agencies. See, e.g., N. Lake Aptmts. v. Bd. of Revision, 8th Dist. No. 41662, 1980 Ohio App. LEXIS 10314, at *4 (dismissing appeal from BTA decision for lack of appellate jurisdiction when party failed to perfect its appeal within 30 days).*

The BTA entered its decision on its journal on March 9, 2015. Thus, NYFF's 30-day deadline to perfect its appeal was April 8, 2015. But NYFF did not file its appeal until April 10,

2015. Consequently, NYFF's appeal is untimely and must be dismissed for lack of appellate jurisdiction.

B. Neither NYFF's motion for reconsideration nor the BTA's decision denying that motion can save NYFF's untimely appeal.

NYFF's filing of a motion for reconsideration of the March 9, 2015 BTA decision did not toll or extend its appeal deadline. "As a general rule, the filing of a motion for reconsideration does not toll the time for appeal." *N. Lake Aptmts.*, 1980 Ohio App. LEXIS 10314, at *4 (citing *Bond v. Airway Dev. Corp.*, 54 Ohio St. 2d 363, 377 N.E.2d 988 (1978)). The BTA Rules of Procedure specifically adopt this "general rule":

(D) *** *The filing of a motion for reconsideration shall not enlarge the period of time upon which an appeal may be taken from this board nor shall the filing of such motion suspend or toll the statutory appeal period.* No motion for reconsideration will be determined by this board after an appeal to any court has been perfected.

See BTA Admin. R. 5717-1-12(D). This is so even though "[in] the general course of proceedings, the BTA rules upon motions for reconsideration," as it did here. *Bd. of Educ. of the Worthington City Schs. v. Franklin Cnty. Bd. of Revision*, 10th Dist. No. 13AP-764, 2014-Ohio-2145, ¶ 13. Accordingly, NYFF cannot claim that its appeal deadline was extended or tolled by its filing of the motion for reconsideration or the BTA's denial of the motion.

In fact, NYFF's notice of appeal is a legal nullity because it attempts to appeal from a decision for which there is no right to an appeal. Seeking to avoid the untimeliness of its appeal, NYFF's notice of appeal purports to appeal the BTA's March 20, 2015 decision denying its motion for reconsideration. But R.C. 5717.04 does not allow appeals from the BTA's denial of a motion for reconsideration. Indeed, "[i]t is axiomatic that there is no right of appeal from the decision of a statutory board, except as provided by statute," and "there is no statutory provision

for an appeal from the denial by the BTA of a motion for reconsideration.” *N. Lake Aptmts.*, 1980 Ohio App. LEXIS 10314, at *4-*5 (citing *Lindblom v. Bd. of Tax Appeals*, 151 Ohio St. 250, 85 N.E.2d 376 (1949)). As detailed above, the BTA unequivocally denied NYFF’s motion for reconsideration. Accordingly, NYFF’s attempt to appeal a decision from which there is no statutory right to appeal is a legal nullity.

The *North Lake Apartments* case is analogous and instructive. There, the appellant moved the BTA to reconsider its initial decision. The BTA denied the motion for reconsideration. The appellant then tried to file its notice of appeal 38 days after the BTA’s initial decision and eight days after the BTA’s denial of the motion for reconsideration. The appellate court held that the appellant’s failure to file within 30 days of the BTA’s initial decision deprived the court of “jurisdiction to reach the merits” of the appeal, and it dismissed the appeal. *N. Lake Aptmts.*, 1980 Ohio App. LEXIS 10314, at *6. The court specifically rejected the appellant’s argument that it was trying to appeal the denial of the motion for reconsideration because there is no such statutory right to appeal. *Id.* at *4-*6. The same result is warranted here.

C. The BTA’s correction of a “typographical error” in its original opinion does not extend or toll NYFF’s time to appeal.

Nor can NYFF claim that the BTA’s issuance of the March 20, 2015 Decision and Order extended or tolled NYFF’s time to appeal the March 9, 2015 Decision and Order. First, the BTA’s March 20 decision did not actually affect its initial March 9, 2015 determination of any of the issues NYFF now seeks to appeal. Rather, the BTA merely corrected a typographical error (i.e., entered a *nunc pro tunc* corrective order) in a portion of the opinion dealing with an issue that NYFF does not seek to appeal. It is “well established that a *nunc pro tunc* order issued that does not create or deny existing rights but merely clarifies the initial entry relates back to the

time of the filing of the initial entry and does not extend the time for appeal.” *State ex rel. Rue v. Perry*, 8th Dist. No. 87810, 2006-Ohio-5320, ¶ 19.² Put differently, “[o]nly when the trial court changes a matter of substance or resolves a genuine ambiguity in a judgment previously rendered should the period within which an appeal must be taken begin to run anew.” *Id.* Consequently, the BTA’s issuance of the March 20, 2015 Decision and Order did not restart the appeal deadline.

Indeed, in *Wells v. Wells*, 2d Dist. No. 26145, 2014-Ohio-4610, the trial court “vacated” a prior decision and issued an “amended decision” in a child support proceeding to merely “correct the trial court’s error [in its original decision] regarding which of the two minor children, J.W. or E.W., resided with [the father] fifty per cent of the time.” The amended opinion did not “affect” any of the “issues” that the father tried to challenge on appeal. The father did not timely appeal the original decision, but tried to appeal the “amended” decision. The court held that the appeal was not timely and that the father should have appealed the original decision:

Thus, the correction of E.W. for J.W. necessitated the trial court’s *decision to vacate* the remaining downward deviation of \$2664.00 of his child support obligation. *If Dale wanted to challenge the portion of the trial court’s original decision:* 1) disallowing the entire \$5,000.00 downward deviation originally recommended by the magistrate; 2) setting his child support obligation in its December 20, 2013, decision, issued approximately eleven months after the hearing before the magistrate; and 3) using his claimed 2013 income of \$107,000.00 as the basis for his child support obligation, *he should have filed a timely notice of appeal of the court’s original decision rendered on December 20, 2013. None of these issues were affected by the trial court’s amended decision.*

Id. at ¶¶ 17-18; *see also State ex rel. Rue*, 2006-Ohio-5320 at ¶ 20 (holding that appellant’s

² On this point, *see also Gold Touch, Inc. v. TJS Lab Inc.*, 130 Ohio App.3d 106, 109, 719 N.E.2d 629 (1998); *Morton v. Morton*, 19 Ohio App.3d 212, 214, 483 N.E.2d 1192 (1984); *Mullen v. Mullen*, 8th Dist. No. 67587, 1995 Ohio App. LEXIS 67; *Soroka v. Soroka*, 8th Dist. No. 62739, 1993 Ohio App. LEXIS 3077; *Butler v. Butler*, 8th Dist. No. 61833, 1992 Ohio App. LEXIS 669.

appeal time did not begin running anew from trial court's corrective entry "that merely corrected a single clerical error, but did not change the substantive determination of the court," but rather ran from the original entry).

The same analysis applies here. The BTA's conclusions here remained the same, and the BTA left no doubt about its intent in issuing the March 20, 2015 clarification, as it stated that it was "proceed[ing] to issue the present [March 20] decision and order *to correct the [typographical] error.*" See 3/20/15 Decision and Order at 1. The phrase "We disagree" was changed to "We agree" to accurately reflect the substance of the BTA's conclusion on an issue NYFF does not seek to appeal. The redline of the two decisions attached here as Exhibit A shows that other than the BTA's denial of the motion for reconsideration and introductory language, the rest of the opinion remains identical to the March 9 opinion besides the change of "We disagree" to "We agree." In substance, the BTA merely denied the motion for reconsideration and fixed a typo.

As detailed above, there is no right to appeal a denial of a motion for reconsideration.³ In any event, this opinion did not affect how any of the issues that NYFF now purports to appeal were decided in the March 9, 2015 Decision and Order. Thus, to timely appeal these issues, NYFF had to timely appeal the March 9 Decision and Order. It failed to do so, so its appeal is untimely.

Second, notwithstanding the BTA's purported "vacation" of the prior Decision and Order, even if the BTA construed NYFF's motion for reconsideration as a motion to vacate, a

³ Also notable, the BTA's decision was issued on March 20. NYFF still had *19 days* until its April 8 appeal deadline to file its simple and mechanical notice of appeal. So, even if a prejudice analysis were appropriate here (which it is not), NYFF cannot complain of actual prejudice in any event.

similar general rule applies: a “motion to vacate judgment does not toll the 30 day period during which the notice of appeal must be filed.” *Waites v. Parr*, 5th Dist. No. CA 4652, 1977 Ohio App. LEXIS 10275, at *4. So, regardless of how the BTA construed or decided NYFF’s motion for reconsideration, NYFF’s deadline to file its appeal remained April 8, 2015—30 days from the date of the BTA’s March 9 Decision and Order.⁴

Third, even if NYFF erroneously relied on the BTA’s characterization of its decision, that cannot save this appeal. In *In re Helen’s Inc.*, 10th Dist. No. 90AP-1027, 1991 Ohio App. LEXIS 2358, the appellant tried to appeal more than 30 days after the trial court entered final judgment because the trial court purported to vacate its earlier final judgment when the appellant moved for reconsideration. Months later, the trial court denied the motion for reconsideration and re-entered final judgment, and the appellant tried to appeal from the date of the newly entered final judgment. The appellate court concluded that as a matter of civil procedure, the trial court had “erroneous[ly]” decided to vacate its “earlier final judgment” and agreed to reconsider the matter. The appellate court thus dismissed the appellant’s appeal as untimely, notwithstanding the appellant’s “unfortunate” and “apparent reliance” on the “trial court’s erroneous decision” to vacate its earlier decision, as that error did “not change the operation of the appellate rules.” *Id.* at *5-*6. Given R.C. 5717.04’s clear guidance, the same analysis applies here.

D. Well-settled principles of appellate jurisdiction hold that this appeal cannot proceed.

Lastly, “complications concerning the timeliness of appeal and whether the Court of

⁴ In any event, under R.C. 5717.04, a party seeking a “vacation” of a prior BTA decision must seek it by appeal to this Court or to an appropriate immediate appellate court. *See* R.C. 5717.04 (“If the taxpayer is a corporation, then the proceeding to obtain [a] reversal, vacation, or modification [of a decision of the board tax appeals] shall be by appeal to the supreme court or to the court of appeals...”).

Appeals is vested with jurisdiction when a motion for reconsideration is filed after a final judgment can and should be avoided.” *Pitts v. Ohio Dep’t of Transp.*, 67 Ohio St. 2d 378, 381, 423 N.E.2d 1105 (1981). Courts can avoid the “arduous task[s]” of “trying to inspect each and every motion for reconsideration which is filed in the [administrative tribunal]” and “try[ing] to decipher form over substance” by adhering to well-settled principles of appellate jurisdiction. *Id.* The applicable principles here are clear and simple: (1) an appellate court is without jurisdiction to consider an untimely appeal; (2) the filing of a motion for reconsideration or a motion to vacate does not extend or toll statutory or rule-based deadlines for appeal; and (3) a mere corrective entry that does not change the substance of the prior opinion or affect the issues the appellant seeks to appeal does not restart the appeal time.

Allowing this appeal to proceed would trample those well-settled principles. The applicable precedents warrant a clear, uniform approach to these issues:

By making allowance for the correction of a non-substantive error in a judgment without extending the time for appeal, the appropriate balance [is achieved] between the desire to bring litigation to an end and the desire that a judgment entry accurately reflect the decision rendered.

State ex rel. Rue, 2006-Ohio-5320 at ¶ 19. More generally, Ohio’s appellate courts uniformly hold that the proper approach to appeal timing issues is steadfast adherence to the applicable appeal timing requirements. *See, e.g., Pitts*, 67 Ohio St. 2d at 1106-08; *In re Helen’s Inc.*, 1991 Ohio App. LEXIS 2358; *Williams v. State Adult Parole Auth.*, 4th Dist. No. 95CA2154, 1996 Ohio App. LEXIS 3824, at *1-*4 (rejecting attempt to appeal the denial of a motion for reconsideration and dismissing appeal as untimely). Accordingly, NYFF’s appeal should be dismissed as untimely.

III. CONCLUSION

NYFF failed to timely perfect its appeal under R.C. 5717.04. Neither its motion for reconsideration nor the BTA's decision denying that motion for reconsideration extended NYFF's statutory time to file its appeal. The BTA issued its decision on March 9, 2015, and NYFF failed to appeal within 30 days from the entry and journalization of that decision. Accordingly, Bedford Heights respectfully requests that this appeal be dismissed for lack of appellate jurisdiction.

DATED: April 16, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that under S.Ct.Prac.R. 3.02(A)(3), the foregoing *Appellees' Motion to Dismiss Appeal for Lack of Appellate Jurisdiction and Memorandum in Support* was filed electronically on April 16, 2015 with the Ohio Supreme Court via the Court's e-Filing Portal. I also certify that under S.Ct.Prac.R. 3.11(C)(1), a copy of the foregoing *Appellees' Motion to Dismiss Appeal for Lack of Appellate Jurisdiction and Memorandum in Support* was served via email and certified mail on the following on April 16, 2015:

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Exhibit A

OHIO BOARD OF TAX APPEALS

NEW YORK FROZEN FOODS, INC. AND
(et. al.),

CASE NO(S). 2012-55 AFFILIATES,

Appellant(s),

(MUNICIPAL INCOME TAX) vs.
DECISION AND ORDER BEDFORD

HEIGHTS INCOME TAX BOARD OF REVIEW AND CITY OF BEDFORD HEIGHTS INCOME TAX
ADMINISTRATOR, (et. al.),

Appellee(s).

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Entered ~~Monday~~Friday, March
9,20, 2015

Mr. Williamson and Mr. Harbarger concur.

This matter is again considered by the Board of Tax Appeals upon appellants' motion for reconsideration. Appellants argue that this board failed to adequately respond to its arguments regarding the city's unconstitutional delegation of authority per its ordinances. Upon review of the motion, we find the request for reconsideration fails to meet the standard set forth in *Matthews v. Matthews* (1981), 5 Ohio App.3d 140, and is therefore denied.

~~Appellants appeal~~Appellant further notes a typographical error in this board's March 9, 2015 decision. Accordingly, we hereby vacate our prior decision and order and proceed to issue the present decision and order to correct the error. This matter is again pending upon appellants' appeal from a decision of the City of Bedford Heights Board of Review ("MBOA") in which it affirmed the decision of the Bedford Heights Tax Administrator rejecting appellants' amended net profits tax returns for 2005, 2006, and 2007. We proceed to consider the matter upon the notice of appeal, the transcript certified by the MBOA, the parties' briefs, and the exhibits jointly stipulated to by the parties.

The decision of the MBOA explains that appellants "timely filed its net profit tax returns, as a single filer, with the Regional Income Tax Agency (R.I.T.A.) for the 2005, 2006 and 2007 tax years. Subsequently, in March 2010, [appellants] sought to file amended returns as a 'consolidated filer' for the years 2005, 2006 and 2007. These 'consolidated returns' would have resulted in tax refunds to [appellants] in excess of \$698,000.00."

MBOA Decision at 1. The returns were rejected by RITA. A hearing was held before the MBOA, where appellants argued that no portion of the city's ordinances prohibited the filings and that any inconsistent RITA regulation is in conflict with the relevant ordinance and therefore null and void. The MBOA affirmed the decision of RITA and the city's Tax Administrator, finding that "[taken] together Sections 1735.15 *** of the Bedford Heights Administrative Code and Section 5:06(A) of the R.I.T.A. Rules and Regulations are identical in effect," and that "[n]either permits a taxpayer to **change the method of accounting or the apportionment of net profits, nor the method of filing after the due date for filing the original return.**" Id. at 2 (emphasis sic).

Section 173.15(a) of the Bedford Heights Administrative Code ("BHAC") provides:

"Where necessary an amended return must be filed in order to report additional income and pay additional tax due, or claim a refund of tax overpaid, subject to the requirements, limitations, of both, contained in Sections 173.30 through 173.35. Such amended returns shall be on a form obtainable from the Tax Administrator. *A tax payer may not change the method of accounting or apportionment of net profits after the due date for filing the original return.*" (Emphasis added.)

The RITA Rules and Regulations, incorporated into the BHAC by Section 173.56, also contain a relevant, similar provision in Section 5:06(A):

"Where necessary, an amended return must be filed in order to report additional income and pay any additional tax due or claim a refund of tax overpaid subject to the requirements or limitations contained in the Ordinance. Such returns shall be clearly marked "Amended." A taxpayer may not change the method of accounting or the apportionment of net profits, *nor the method of filing (i.e., single or consolidated)*, after the due date for filing the original return. Amended returns cannot be filed after three (3) years from the original filing date." (Emphasis added.)

In its decision, the MBOA found that, taken together, these sections prohibit an attempt to change from a single filer to a consolidated filer, as such a change is a "change in the method of accounting or apportionment of net profits or the method of filing." On appeal, appellants argue that BHAC Section 173.15(a) does not prohibit timely filing an amended return on a consolidated basis; that filing on a consolidated basis is not a change in the method of accounting or apportionment of net profits; that RITA Rule 5:06(A) adds an additional prohibition to BHAC Section 173.15(a), i.e., a prohibition on changing the method of filing in an amended return, and is therefore inconsistent and invalid; that R.C. 718.06 requires the city to accept amended consolidated returns; and that the city's incorporation of RITA rules and regulations not in place when it adopted its relevant ordinances is an unconstitutional delegation of legislative authority.

We begin our review of this matter by noting that when cases are appealed from a municipal board of review to the BTA, the burden of proof is on the appellant to establish its right to the relief requested. *City of Marion v. City of Marion Bd. of Review* (Aug. 10, 2007), BTA No. 2005-T-1464, unreported, appeal dismissed, 2008-Ohio-2496. See, also, *Tetlak v. Bratenahl* (2001), 92 Ohio St.3d 46, at 51. Cf. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121.

Appellants argue that filing amended consolidated returns is not a "change in the method of accounting or apportionment of net profits." We ~~disagree~~agree. Appellants point to the July 2009 change to RITA Rule 5:06(A), to additionally prohibit a change in the "method of filing (i.e., single or consolidated)" as clear support for their argument that BHAC Section 173.15(a) did not include a change in the method of filing. Appellants argue that a change in the "method of accounting" encompasses only cash versus accrual accounting, citing to IRS Publication 538. Further, appellant argue that a change in the "method of apportionment" is already addressed by a separate ordinance that details a formula to be used to apportion net profits for tax purposes. In response, the appellees focus on the amount of refund claimed by appellants as a result of filing their amended consolidated returns, i.e., approximately \$700,000: "the mere fact that

[appellants] claims entitlement to a refund of almost \$700,000 on net profits taxes that [they] had to pay when [they] filed on a single-filer basis shows that [appellants'] attempt to file amended consolidated returns constituted a prohibited 'change' in the 'method of accounting... of net profits.'" Appellees' Brief at 11. We do not find the amount claimed as a refund to be dispositive, or even telling, on this point.

What is more telling is the difference in the language of BHAC Section 173.15(a) and RITA Rule 5:06(A): because the RITA rule specifically added the language "nor the method of filing (i.e., single or consolidated)," it is clear that changing from single filing to consolidated filing is not the same as changing the method of accounting or apportionment, which were already prohibited by the rule. See, e.g., *Nought Industries, Inc. v. Tracy* (1995), 72 Ohio St.3d 261, 265-266; *Wardrop v. Middletown Income Tax Review Bd.*, Butler App. No. CA2007-09-235, 2008-Ohio-5298, at ¶24; *City of Heath v. Licking Cty. Regional Airport Authority* (1967), 16 Ohio Misc. 69, 78-79. We therefore find that appellants' filing of amended returns as a consolidated filer was not prohibited by BHAC Section 173.15(a).

This board must therefore determine whether appellants' amended returns were barred by RITA Rule 5:06(A). Appellants make several arguments regarding the rule's applicability. First, they argue that the city had not incorporated the version of RITA Rule 5:06(A) that contained the prohibition on filing an amended return that changed the method of filing, which was adopted in July 2009. BHAC Section 173.56 provides:

"(a) Effective January 1, 1996, there is hereby adopted for the purpose of establishing rules and regulations for the collection of municipal income taxes and the administration and enforcement of this chapter the Rules and Regulations of the Regional Income Tax Agency (R.I.T.A.), in the most current edition or update thereof, including all additions, deletions, and amendments made subsequent hereto, and the same are hereby incorporated herein as if fully set out at length save and except such portions as may be hereinafter added, modified, or deleted therein.

"(b) R.I.T.A.'s Rules and Regulations shall be in addition to any rules and regulations adopted and promulgated by the Tax Administration pursuant to authority granted under Section 173.04 herein. In any matter where a rule or regulation adopted and promulgated by the Tax Administrator conflicts with any of R.I.T.A.'s Rules and Regulations, the rule or regulation adopted and promulgated by the Tax Administrator shall prevail over and render null and void the R.I.T.A. rule or regulation with respect to the City of Bedford Heights."

Appellants argue that the above ordinance could only adopt those RITA rules and regulations in effect at the time of its enactment — December 21, 2004, and not any changes made to the RITA rules and regulations thereafter. Therefore, appellants argue, the city did not adopt the version of RITA Rule 5:06(A) that prohibited changing the method of filing in an amended return.

Appellants further argue that the city could not adopt future changes in the RITA rules and regulations, citing appellate court cases relating to cities defining income for purposes of their own tax ordinances by referencing the federal definitions. In both these cases, the court found that the ordinances in question incorporated only those relevant portions of the internal revenue code that existed at the time the ordinance was passed, i.e., not subsequent amendments thereto. However, the Supreme Court, in *State v. Gill* (1992), 63 Ohio St.3d 53, noted the difference between incorporating law as it then existed and as it is subsequently amended:

"In 1964, Congress established a comprehensive food stamp program to aid in the fight against hunger and malnutrition. Section 2011 *et seq.*, Title 7, U.S. Code. R.C. 2913.46(A) became effective on July 1, 1983. Prior to this date, the federal food stamp law had been revised. It is clear to us that the General Assembly, by using the language 'as amended,' did not intend to adopt amendments to the federal law subsequent to the effective date of R.C. 2913.46(A), but, rather,

the General Assembly simply intended to incorporate the federal food stamp law as it existed on the date R.C. 2913.46(A) was enacted. Given its common and plain meaning, the language 'as amended' does not anticipate amendments to the federal law after July 1, 1983. This is buttressed by the fact that had the General Assembly intended to incorporate the federal law subsequent to the enactment of R.C. 2913.46(A), it certainly knew how to do so. For example, R.C. 2915.01(AA) provides that the 'Internal Revenue Code' means the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C. 1, *as now or hereafter amended.*' (Emphasis added.) There is a notable distinction between the language used in R.C. 2915.01(AA) and in 2913.46(A). In utilizing the language 'as now or hereafter amended,' the General Assembly obviously intended to incorporate amendments subsequent to the time R.C. 2915.01(AA) was enacted." *Id.* at 55-56.

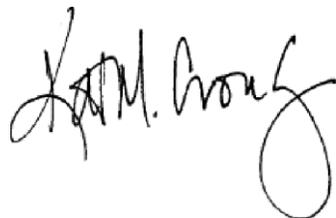
Based upon the foregoing case law and the language of the BHAC Section 173.56, we find that the City, in its most recent incorporation of RITA Rules and Regulations in December 2004, clearly incorporated the July 2009 change to RITA Rule 5:06(A) which prohibits changing the method of filing in an amended return. Accordingly, we find that the rule did bar appellants' filings. To the extent appellants make constitutional arguments regarding such incorporation, it is well established that this board is without jurisdiction to declare a given statute or ordinance to be unconstitutional. *S.S. Kresge Co. v. Bowers* (1960), 170 Ohio St. 405, paragraph one of the syllabus; *Herrick v. Kosydar* (1975), 44 Ohio St.2d 128, 130; *Roosevelt Properties Co. v. Kinney* (1984), 12 Ohio St.3d 7, 8; *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St.3d 229, paragraph one of the syllabus; *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195, 198. Therefore, we acknowledge any such arguments, but make no findings in relation thereto.

Based upon the foregoing, we find that the MBOA did not err when it found that appellants' amended returns for tax years 2005, 2006, and 2007 were improper. Accordingly, we find that the decision of the City of Bedford Heights Board of Review must be, and hereby is, affirmed.

BOARD OF TAX APPEALS		
RESULT OF VOTE	NO	
Mr. Williamson	e	
Mr. Harbarger		



I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.

A handwritten signature in black ink, appearing to read "Kathleen M. Crowley". The signature is fluid and cursive, with a large loop at the end of the last name.

Kathleen M. Crowley, Board Secretary

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